**Calendar No. 587**

| 100TH CONGRESS *2d Session* | SENATE | REPORT 100-301 |
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# FEDERAL EMPLOYEE COMPENSATION EQUITY STUDY COMMISSION ACT OF 1987

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## REPORT

OF THE

## COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

## S. 552

together with

## MINORITY VIEWS

TO IMPROVE THE EFFICIENCY OF THE FEDERAL CLASSIFICATION SYSTEM AND TO PROMOTE EQUITABLE PAY PRACTICES WITHIN THE FEDERAL GOVERNMENT AND FOR OTHER PURPOSES

MARCH 16 (legislative day, MARCH 14), 1988.—Ordered to be printed

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100TH CONGRESS
*2d Session*

SENATE

REPORT
100-301

# FEDERAL EMPLOYEE COMPENSATION EQUITY STUDY COMMISSION ACT OF 1987

MARCH 16 (legislative day, MARCH 14), 1988.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs, submitted the following

## REPORT

together with

## MINORITY VIEWS

[To accompany S. 552]

The Committee on Governmental Affairs, to which was referred the bill (S. 552) to improve the efficiency of the Federal classification system and to promote equitable pay practices within the Federal government, and for other purposes, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

CONTENTS

| | | Page |
|---|---|---|
| I. | Purpose | 1 |
| II. | Background | 2 |
| III. | Legislative history | 3 |
| IV. | Agency views | 5 |
| V. | Section-by-section analysis | 15 |
| VI. | Regulatory impact of legislation | 18 |
| VII. | Changes in existing law | 19 |
| VIII. | Cost estimate of legislation | 19 |
| IX. | Minority views | 20 |

## I. PURPOSE

The purpose of S. 552 is to commission a study of the rates of basic pay for Federal jobs in executive agencies to determine whether they are in accordance with sections 5101 and 5341 of title

5, United States Code, and are not based on considerations of sex, race, or national origin. The study and any findings or recommendations of the Commission under this Act shall be considered to be of an advisory nature only.

## II. Background

A September 1987 report, "Comparable Worth for Federal Jobs," prepared by the Office of Personnel Management noted, "in the federal government, as in the labor forces as a whole, women tend to earn less than men. The average salary for female government workers in 1986 was $21,190, while that for male workers was $30,590; thus, women earned 69 percent of what men earned." A November 1986 Bureau of Census report entitled "Women in the American Economy" stated that "the puzzle is not so much that there is a gap in the pay between men and women, but rather, why there are differences in occupational employment patterns by sex." The study mandated by S. 552 will provide useful information about that pay gap and assist Congress as it continues its deliberations on wholesale reform of the federal classification and pay systems.

The federal classification system has not been thoroughly examined for a systemic bias since 1923, the year of its creation. Chapter 51 of title 5, United States Code (U.S.C.), requires that the federal civil service personnel system be based upon a classification of positions in which the rate of basic pay is determined by equal pay for substantially equal work. In addition, variations in pay should be in proportion to substantial differences in difficulty, responsibility and qualification requirements.

In 1986, the General Accounting Office (GAO) provided Senator Alan Cranston and Senator Dan Evans with an analysis of the statutory objectives of Chapter 51 of title 5 U.S.C. GAO concluded by stating "ideally then, the implementation of 5 U.S.C., Chapter 51 should result not only in equal pay for equal work, but also in (1) equal pay for different work which is valued equally in terms of difficulty, responsibility, and qualification requirements, and (2) proportionate pay for work that differs in value."

In 1985, at the request of eleven members of Congress, GAO prepared a report on "Options for Conducting a Pay Equity Study of Federal Pay and Classification Systems". In the compilation of its report, GAO interviewed experts in job evaluation and labor economics and surveyed state and local governments. The study showed that at that time only 14 states had not undertaken any preliminary pay equity studies. Most states were conducting at least preliminary studies on pay equity. Four states, Washington, Connecticut, Minnesota, and New Mexico had begun actual implementation of their pay equity study results. The state employees in Alaska not only had a classification system which meets pay equity criteria but the state also statutorily defined pay disparities between "comparable" work as a discriminatory employment practice.

The GAO report contained many helpful recommendations on how the federal government could best conduct a study of its classification system. GAO outlined the necessity for having an inde-

pendent entity conduct the pay equity study. The report emphasized that the complexity of the issue and the size of the undertaking requires an independent body which would have the authority to make policy decisions regarding the scope of the study, guide the work of the consultant, interpret the study results and make recommendations. GAO suggested that the members of such a commission have expertise in the areas which will be addressed by the pay equity study. In addition, GAO strongly recommended the use of both job content analysis and economic analysis as study methods to provide a comprehensive view of the pay equity issue.

S. 552 was designed to implement the GAO recommendations as fully as possible. The bill creates a nine member Commission on Compensation Equity, the members of which, shall to the extent practicable, have "extensive knowledge and technical expertise in the major areas of the Commission's consideration and study". The Commission will develop the specifications for the study in the form of a request for proposals and choose a qualified consultant to conduct the study from lists prepared by the Comptroller General of the United States, the Congressional Office of Technological Assessment, and the National Academy of Sciences. The Commission will have the authority to hold hearings and take testimony. Upon completion of the study by the consultant, the Commission shall submit to Congress the study and any findings and recommendations as it considers necessary.

As recommended by GAO, the bill requires that the consultant use the techniques of economic analysis and job evaluation analysis in the performance of the study. Economic analysis requires examining differential in pay between and among positions within occupations in order to determine whether differentials are attributable to factors such as seniority, merit, productivity, education, work experience, geographic location, supply and demand or other applicable factors. Job evaluation analysis rates positions within occupations based on factors such as skill, effort, responsibilities, qualification requirements, and working conditions.

## III. Legislative History

Legislation to mandate a pay equity study was introduced in the Senate in the 98th Congress by Senator Daniel Evans, S. Con. Res. 83, and Senator Alan Cranston, S. 1900. No action was taken on either measure in the Senate. Representative Mary Rose Oakar introduced pay equity study legislation, H.R. 5680. It was referred to the Subcommittee on Compensation and Employee Benefits, where hearings were held. The bill was referred to the Committee on Post Office and Civil Service, marked-up and reported to the full House. H.R. 5680 was approved by the House on June 28, 1984.

In the 99th Congress, pay equity study legislation was again introduced. S. 519, introduced by Senator Evans and Senator Cranston, was referred to the Governmental Affairs Committee. While no hearings were held on S. 519, the Subcommittee on Civil Service, Post Office and General Services held four days of hearings on the General Accounting Office report "Options for Conducting a Pay Equity Study of Federal Pay and Classification System".

H.R. 3008, introducted by Representative Oakar, was referred to the Committee on Post Office and Civil Service. Hearings were held in the Compensation and Employee Benefits Subcommittee. The bill was approved by the House on October 9, 1985 and referred to the Committee on Governmental Affairs. No further action was taken in the Senate on either S. 519 or H.R. 3008.

In the 100th Congress, Representative Oakar and Senators Evans and Cranston introduced H.R. 387 and S. 552. The House bill was referred to the Subcommittee on Compensation and Employees Benefits which marked-up the bill and referred to the Committee on Post Office and Civil Service, where it is pending. S. 552 was referred to the Subcommittee on Federal Services, Post Office, and Civil Service, which held a hearing on the bill on April 22, 1987. The following witnesses provided testimony:

—Senator Alan Cranston, State of California.
—Senator Daniel J. Evans, State of Washington.
—Constance Horner, Director, Office of Personnel Management.
—Rosslyn S. Kleeman, Associate Director, General Government Division, General Accounting Office.
—Eileen Stein, Chairperson, National Committee on Pay Equity.
—James M. Peirce, President, National Federation of Federal Employees.
—Barbara Curtis, Board of Directors, American Nurses Association.
—Robert M. Tobias, President, National Treasury Employees Union.
—Bobbi Thompson, President, Aviation Sales, representing the Chamber of Commerce.
—Susan Vergeront, Wisconsin State Assembly, representing the National Association of Manufacturers.
—Lawrence Z. Lorber, Breed, Abbot & Morgan, representing the American Society for Personnel Administration.

Proponents of the legislation emphasized the fact that there is no dispute over the existence of a pay gap. The reason for the gap and its continuance is a matter of great concern. The study mandated by S. 552 would employ methodologies recommended by GAO and used by many state and local governments in conducting pay equity studies. Congress will have the benefit of a report from an independent Commission which has been tasked with examining the situation. The study and the Commission's findings and report will be considered advisory in nature only and will not have the force of law.

Opponents of the legislation were concerned that this legislation might leave the federal government liable if Congress does not fully accept and implement the Commission's recommendations. This fear is not substantiated by a survey of court decisions across the country. The Ninth Circuit Court of Appeals, in *American Federation of State, County and Municipal Employees* v. *State of Washington,* overturned a decision which would have forced the state to fully and immediately implement the recommendations of the pay equity study conducted by that state. The court based its decision on the fact that the state's market-based compensation system had been developed through complex market processes and was not a clearly delineated attempt at discrimination. In addition, the court

decided that a discriminatory motive could not be inferred from the continued use of market rates in the setting of state salaries; that Title VII does not obligate a state to eliminate an inequality it did not create; and that a state, having commissioned a pay equity study, was not bound to implement the results and it would be counter productive to "penalize rather than commend employers for their effort and innovation in undertaking such a study." This decision is echoed in other court decisions.

The GAO, in its 1986 analysis of the statutory objectives of Chapter 51 of title 5 U.S.C., also noted that the Supreme Court has held "an individual employee would not be able to enforce these [title 5] policy objectives through a suit for money damages . . . neither the classification principles stated in 5 U.S.C. section 5101 nor any of the other provisions in 5 U.S.C. Chapter 51 create an entitlement to backpay for a period of wrongful classification." In its testimony before the Committee, GAO stated that "federal case law indicates employers are not required to implement any changes a study suggests. . . ."

On July 21, 1987, the subcommittee reported an amendment in the nature of a substitute to the Committee on Governmental Affairs. The Committee held a mark-up on November 20, 1987 and, by voice vote, approved the referral of the bill to the Senate. As of February 22, 1988, the bill had 40 Senate cosponsors: Evans; Cranston; Glenn; Cohen; Levin; Heinz; Adams; Baucus; Bingaman; Burdick; DeConcini; Dodd; Kerry; Leahy; Melcher; Metzenbaum; Mikulski; Moynihan; Packwood; Pell; Riegle; Simon; Specter; Stafford; Mitchell; Inouye; Proxmire; Wirth; Harkin; Gore; Chafee; Daschle; Sanford; Conrad; Sasser; Kennedy; Biden; Weicker; Bentsen; Sarbanes.

## IV. Agency Views

The Committee notes the objections of the Office of Personnel Management (OPM) and the Department of Justice to S. 552. OPM presented its arguments at the hearing held by the Subcommittee on Federal Services, Post Office and Civil Service and in the following letter:

Office of Personnel Management,
*Washington, DC, June 24, 1987.*

Hon. David H. Pryor,
*Chairman, Subcommittee on Federal Services, Post Office and Civil Service, U.S. Senate, Washington, DC.*

Dear Senator Pryor: Thank you for your recent letter inviting our suggestions on the makeup of the Commission on Compensation Equity. Your concern for achieving balance within this group, as well as your more general concern for achieving broad-scope pay reform, is greatly appreciated.

Unfortunately, I am obliged to decline your request for suggestions on broadening the composition of the Commission. As I mentioned in my testimony, the Administration's objection to the bill go far beyond objections to the Commission itself. Our concern is that, even given a balanced Commission, S. 552 would be unable to produce unbiased results.

The fundamental flaws of the bill lie with the study methodology itself. The problem is that neither a job evaluation analysis nor an economic analysis can identify or prove discrimination. Concerning the job evaluation analysis, various systems could be developed by highly-regarded job evaluation experts, none of which might be materially better than our current system and each of which would produce very difficult results. In fact, a comparison of pay equity studies conducted by state governments shows they have rated similar jobs quite differently. Thus, one firm might find female-dominated jobs in the Federal government were underpaid while a second found them to be overpaid. With the highly subjective process of job evaluation, arriving at an "objective" determination of job worth is simply not feasible.

Concerning the economic analysis, similar studies performed on economy-wide data have shown that about one-quarter to three-quarters of the female/male earnings gap can be accounted for using quantifiable human capital variable (e.g., years of education, years of work experience, job tenure); however, the "residual" or unexplained gap cannot be labeled discrimination—it is simply a measure of our inability to identify and measure all conceivable non-discriminatory factors. In fact, some of the most important variables—motivation, ambition, career expectations, job preferences, willingness to relocate, etc.—cannot be adequately factored out of a comparison by any reasonable statistical methodology. Manipulating wage rates on the basis of such studies is, therefore, likely to be both inefficient and unjust.

Thus, as we see it, S. 552 purports to accomplish objectives it simply cannot accomplish through the methodologies employed. Moreover, its recommendations for change would focus on a single aspect of the existing classification and pay system—a system which both Congress and the Administration agree is in need of a major overhaul. As you noted at the S. 552 hearing, pay reform issues deserve our immediate attention. It should be emphasized that one critical element of any pay reform plan would be ensuring the new system was designed and implemented in a non-discriminatory fashion.

I would be very glad to meet with you to discuss S. 552 and pay reform in greater detail. Again, I appreciate your efforts to seek a balanced approach to resolving these difficult pay issues.

The Office of Management and Budget advises that the enactment of S. 552 would not be in accord with the program of the President.

Sincerely,

CONSTANCE HORNER, *Director.*

The Department of Justice has registered additional objections to S. 552 in a letter to the Chairman of the Governmental Affairs Committee. The section dealing with the Justice Department's constitutional concerns follows:

OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
U.S. DEPARTMENT OF JUSTICE,
*Washington, DC.*

Hon. JOHN GLENN,
*Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: Furthermore, the bill contains serious constitutional flaws which are independent reasons for opposing its enactment.

First, the Commission created by Sections 3 and 6 of the fill is to be composed of nine members, two appointed by the President, three appointed by the Director of OPM, and one each appointed by the majority leader of the Senate, the minority leader of the Senate, the Speaker of the House of Representatives, and the minority leader of the House of Representatives. Congress should not, absent compelling reasons, establish a Commission composed of members of both the legislative and executive branches. The creation of such a hybrid Commission, which is neither clearly legislative nor clearly executive, tends to erode the important structural separation of powers, a fundamental principle ordained by our Constitution. The Framers of the Constitution purposely divided federal authority among three separate branches of government. As established by this bill, the Commission could not be considered a part of any one of the branches, and would be in the difficult position of having to serve two masters. Although the branches of Government are not "hermetically sealed" from one another, *Immigration and Naturalization Service* v. *Chadha,* 462 U.S. 919, 951 (1983), the separation of powere inherent in our Constitution requires that each branch maintain its separate identity, and that functions and responsibilities be clearly assigned among the separate branches, so that each can be held accountable for its actions. *Buckley* v. *Valeo,* 424 U.S. 1, 120–124 (1976). The proposed Commission does not mesh with this constitutional structure.

Our second constitutional objection relates to Section 5(c) of the bill, which provides that not later than ninety days after the Commission submits to the appropriate congressional committees its report on the results on the consultant's study, the Director of OPM shall submit to such Committes and the Commission a report commenting on the Commission's report and specifying the Director's plan (and timetable therefore) to carry out each of the Commission's recommendations or, in the event that the Director does not specify a plan to carry out one or more of such recommendation, the Director's reasons for not specifying such plan.

It is possible to interpret this provision as making the Commission's report binding on the executive branch since the Director is required to comply with each of its recommendations, unless he specifies reasons for noncompliance. As so interpreted, such a provision would raise two serious constitutional problems. First, since the Commission by virtue of its membership is not wholly within the executive branch, issuing "recommendations" that must be implemented by the executive branch would, we believe, essentially constitute the passage of legislation. The Commission is, in effect, drawing up new laws for the executive branch to implement. However, the delegation of legislative functions to committees or com-

missions clearly contravenes the Constitution. See *Immigration and Naturalization Service* v. *Chadha, supra*. If Congress wishes to enact the Commission's recommendations into law, it is free to do so. what it cannot do is direct the executive branch to execute "recommendations" that have not been enacted by both houses of Congress, presented to the President for signature, and signed into law.

Second, even if one were to assume that the Commission is within the executive branch (an assumption which is at odds with its membership) and is itself executing the law by issuing the equivalent of agency regulations, a person who exercises significant authority pursuant to the laws of the United States is necessarily an office in the constitutional sense and must be appointed in conformance with the Appointments Clause of the Constitution. See U.S. Const., art. II, sec. 2, cl. 2; *Buckley* v. *Valeo, supra*, 424 U.S. at 126, 141. However, four of the members of the Commission are appointed by members of Congress, a method of appointment that is not in conformance with the Appointments Clause. Thus, whether the Commission is veiwed as attempting to create new law or to implement existing law, we believe that its activities would violate the Constitution if the Commission's recommendations have binding force on the Director of OPM.

Whether or not one views the Commission's functions as binding or merely advisory, Section 7(e)(4) of the bill raises additional constitutional problems. This section forbids any officer or agency of the federal government from requiring the Commission to submit any report or recommendation for approval, comment or review prior to submission of the material to the Congress or congressional committees. Thus, although those members of the Commission appointed by the President or the Director of OPM are subordiante executive branch officials, they will not be permitted to submit their proposals to the President for his review. However, the President, as Chief Executive, is charged with supervising the work of subordinate officers in order to insure that the laws are "faithfully executed." U.S. Const., art. II, sec. 3. We do not believe that Congress has the power to interfere with that supervisory power by interdicting communications between the President and his subordinates and therefore believe that this provision is unconstitutional.

Similarly, the constitutionality of Section 7(e)(4) can be further questioned in light of Section 5(b)(2) of the bill, which directs the Commission to prepare recommendations "for such administrative or legislative actions" as it considers appropriate. Again, Section 7(e)(4) forbids any officer of the executive branch—including, we must assume, the President—from reviewing such proposed legislation before it is submitted to Congress. However, the Constitution states that it is the President's duty to submit only such recommendations for legislation "as he shall judge necessary and expedient." U.S. Const., art. II, sec. 3. We believe that Section 7(e)(4) is a grave interference with that power, and that the President must have the power to direct his subordinate officers, and perhaps the entire Commission, insofar as a majority of it members are executive officers. Thus, the attempt by Congress to deny the President such power would be significant interference with the President's

power to require that the executive branch submit to Congress only legislation that he judges "necessary and expedient."

No good reason has yet been advanced for the enactment of this legislation. S. 552 does not address legitimate "pay equity" concerns of women who receive lower wages than their male counterparts for the same work. Nor is the comparable worth study commissioned by the bill calculated to assist in identifying Title VII wage discrimination in the form of intentionally depressed female wages. Futher, the comparable worth study is not useful in identifying race or ethnic pay discrimination. What the study will show is that wholly different jobs can be "rated" by outside consultants as comparable yet offer wholly different pay—a fact well known without a study. If sex, race or ethnic discrimination in involved in any federal pay practice, to weaving out of whole cloth a legislative presumption of wrongdoing in the setting of federal wages.

The Office of Management and Budget has advised this Department that there is not objection to the submission of this report and that enactment of S. 552 would not be in accord with the program of the President.

Sincerely,

JOHN R. BOLTON,
*Assistant Attorney General.*

The study design of S. 552 relied heavily on the recommendations contained in the 1986 GAO report. After an in-depth analysis of various methods of job evaluation, GAO concluded that "use of both approaches (economic and job content) can provide a clearer understanding of how federal wages are set and would be less susceptible to charges that important explanatory variables have been ignored."

At the request of Senator David Pyror, the American Law Division of the Congressional Research Service analyzed the Justice Department's constitutional questions regarding S. 552. The following memo was provided:

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
*Washington, DC, February 11, 1988.*

To: Subcommittee on Federal Services, Post Office, and Civil Service. Attention: Kim Weaver.
From: American Law Division.
Subject: Appointment Provisions in S. 552, Creating a Commission on Compensation Equity.

This memorandum responds to your request for analysis of constitutional issues raised by S. 552, as approved November 20, 1987, by the Senate Committee on Governmental Affairs. The bill creates a Commission on Compensation Equity charged with studying federal executive agency job classifications and pay scales in relation to wage discrimination based on sex, race, or national origin, and with reporting findings and recommendations to specified congressional committees. Prior to submittal of the report to the congressional committees, interim "approval, comment, or review" by any officer or agent of the Government is prohibited. A copy of the report is to be provided to the Director of the Office of Personnel

Management (Director), and, within ninety days of the submission of the recommendations to the committees, the Director must submit a report containing a detailed response to each of the findings and recommendations of the Commission. The bill declares that the Commission's findings and recommendations "shall be considered to be of an advisory nature only."

Two members of the Commission are to be appointed by the President, four by congresssional officers, and three (designated by principal federal employee labor unions) by the Director. You ask whether this appointment arrangement comports with the requirements of the Appointments Clause of the Constitution.

Moreover, you ask that we analyze Justice Department objections, based on general separation of powers concerns, raised in a letter of April 20, 1987, addressed to the Committee Chairman. That letter critiqued an earlier bill version; while our analysis attempts to determine which aspects of the Department's objections have been mooted by changes in bill language, we do not have the benefit of the Department's comments on the current language.

APPOINTMENTS CLAUSE

Because the functions of the Commission would be solely advisory, the presence of the Commission of persons appointed by congressional officers would not be inconsistent with the requirements of the Appointments Clause of the Constitution, Art. II, § 2, cl. 2., as interpreted by the Supreme Court in *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

The Appointment Clause requires appointment by the President, and confirmation by the Senate, of "all officers of the United States" whose appointments are not otherwise provided for in the Constitution. Congress may provide for the appointment of "inferior Officers" by the President alone, by the courts, or by heads of Departments. In *Buckley* the Court determined that "any appointee exercising significant authority pursuant to the laws of the United States, is [either] an 'Officer of the United States' " who must be appointed by the President and confirmed by the Senate, or is an "inferior officer" who must be appointed by the President, the courts, or a head of a Department. 424 U.S. at 126. Note that, although the Court used the term "Officers of the United States," it borrowed from *United States* v. *Germaine,* 99 U.S. 508, in redefining the term to include both "Officers of the United States" and "inferior officers" in the Appointments Clause sense. *See* 424 U.S. at 125–26.

The Court further ruled in Buckley that members of the Federal Election Commission were "exercising significant authority pursuant to the laws of the United States" when they "exercised the Commission's enforcement powers, exemplified by its discretionary power to seek judicial relief" (424 U.S. at 138), and when they exercised "the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself" (424 U.S. at 140). Four of the voting numbers of the FEC were appointed by congressional officers and the other two by the President; these members were subject to confirmation not by the Senate alone, but by both Houses of

Congress. This arrangement, the Court held, violated the Appointments Clause to the extent that the FEC was vested with executive powers.

Other functions of the FEC, the Court ruled, could be performed by those neither "officers of the United States" nor "inferior officers." These were the functions "essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees." 424 U.S. at 137.

The Justice Department's letter addressing S. 552 characterized an earlier bill version as "making the Commission's report binding on the executive branch" since the Director of OPM was required by section 5(c) of the earlier bill to submit a plan "to carry out each of the Commission's recommendations or [to submit] reasons for not specifying such plan." If one were to accept this characterization as accurate, then, arguably, the Commission would be exercising executive power and the Appointments Clause would be violated. *See Bowsher* v. *Synar,* 478 U.S. ——, 92 L.Ed.2d 583 (1966) (authority vested in Comptroller General to make revenue projections and specify budget cuts binding on the President is executive in nature). However, the fact that the Director was not required to implement the plan, but could instead explain why he was not doing so, distinguishes the *Synar* case and suggests that the language would not have made the Commission's recommendations "binding on the executive branch." Similarly, the current language of section 5(c) does not constrict executive authority: the only responsibility placed on the Director is that he submit to the committees and to the Commission "a report which shall include a detailed response to each of the findings and recommendations of the Commission."

Because the solely advisory nature of the proposed Commission's functions seems "sufficiently removed from the administration and enforcement of the public law" (*Buckley,* 424 U.S. at 139), and because these functions might be described as being "essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees" (Id., at 137), there appears to be sound basis for concluding that the functions may be performed by persons neither "Officers of the United States" nor "inferior officers."

SEPARATION OF POWERS

The Department suggests that establishment of "hybrid" commissions composed of members of both the executive and legislative branches "tend[s] to erode the important structural separation of powers, a fundamental principle ordained by our Constitution." This generalized principle, in the Department's view, requires that "each branch maintain its separate identity, and that functions and responsibilities be clearly assigned among the branches." The suggestion apparently is that Congress should decide in which branch to place the particular commission, and should vest the sole appointment power in that same branch. If a commission is to advise the President, then, in the Department's previously expressed view, its members should be appointed by the President. If

the commission is to advise the Congress, then Congress could vest such authority in an existing committee, or could create a "special investigatory body" by simple resolution not requiring the President's signature. See letter from Assistant Attorney General McConnell to Rep. Fuqua, reprinted at 130 Cong. Rec. H10654 (daily ed. Oct. 2, 1984) (expressing similar objections to the composition of a proposed National Nutrition Monitoring Council).

While the Justice Department cites Supreme Court opinions in support of this generalized separation of powers argument, it seems clear from a reading of these and other authorities that the Court has not required so rigid a separation. Within the framework of three separate branches exercising three distinct powers, there is room for "play in the joints" permitting cooperation and interdependence necessary to a workable government.

> [T]he rule is that in the actual administration of the government Congress . . . should exercise the legislative power, the President . . . the executive power, and the Courts . . . the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination.

*Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928), quoted also in *Buckley* v. Valeo, 424 U.S. 1, 121–22 (1976). The basic question, then, is whether executive power would be assumed by the Congress or legislative power conferred upon the Executive. The analysis of the Appointments Clause issue, *supra*, suggests that this is not the case.

Separation of powers principles may be violated even in the absence of conflict with one of the Constitution's specific provisions, such as the Appointments Clause. But in order to find such a violation, a court must determine that one branch has intruded into the province of another branch to such an extent that it disrupts the other branch in performing its constitutionally assigned functions. The Supreme Court has taken a "pragmatic, flexible" approach to such inquires. In holding that the Presidential Recordings and Materials Preservation Act does not violate separation of powers principles, the Court explained that:

> In determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is

> present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

*Nixon* v. *Administrator of General Services*, 433 U.S. 425, 442–43 (1977).

S. 522 does not appear to disrupt the President's ability to perform his constitutionally assigned function. The advisory functions to be performed by the Commission could be performed by various entities within the Executive and Legislative branches. The Commission is to report to the Congress, and not to the President. The only requirement for Executive Branch response to the recommendations of the Commission is that the Director of OPM must provide a detailed response to each of the Commission's findings and recommendations. This requirement does not appear to constrain in any manner the nature of the recommendations that the Executive Branch may wish to make on legislation in the area, requires no implementation in the form of revised job classifications, pay scales, and the like, and thus does not bind the executive in implementation of existing law. Nor does the requirement that the President appoint two members of the Commission (who need not be executive branch officers) appear to impinge significantly on the President's performance of his duties.

The Justice Department contends, however, that the President's authority to supervise subordinate executive branch officers, and his authority to control executive branch recommendations for legislation, are impaired by section 7(e)(4) of the bill:

> No officer or agency of the United States Government shall require the Commission to submit any report, recommendation, or other matter to any such officer or agency for approval, comment, or review before submitting such report, recommendation, or other matter to Congress or committees of Congress.

The Department assumes that "those members of the Commission appointed by the President or the Director of OPM are executive branch officials," and argues that the provision interferes with the President's ability to faithfully execute the laws because it "interdict(s) communications between the President and his subordinates."

The premise that Commission members appointed by the executive are necessarily executive branch officials subordinate to the President is questionable; as outlined above, the Commission is not vested with executive branch functions, and, under *Buckley,* its members are neither "Officers of the United States" or "inferior officers."

The proposition that executive branch officials may not be called upon to participate in formulation of findings or recommendations for Congress free of executive branch review runs generally counter to the passages quoted above from the *Hapton* and *Nixon* cases suggesting a functional approach to separation of powers that allows for cooperation among the branches. And, while we find no case law directly on point, there is recent authority for the proposition that Congress may insulate executive officials from presiden-

tial interference in the performance of discretionary duties. *See Public Citizen* v. *Burke,* 655 F. Supp. 318 (D.D.C. 1987) (Department of Justice memorandum defining executive privilege for purposes of Presidential Recordings and Materials Preservation Act interferes with discretion vested by that statute in the Archivist to make initial rulings on former President Nixon's claims of executive privilege). Moreover, there is abundant legislative precedent for requirements that executive agency budget requests or legislative proposals be submitted directly to Congress without review. See, e.g., Pub. L. 93-328, § 23, 88 Stat. 287 (1974) (Postal Service budget requests); 12 U.S.C. § 250 (language similar to proposed S. 552, governing "legislative recommendations, or testimony, or comments on legislation" of five financial regulatory agencies).

General support for the Department's position arguably may be found in the recent opinion of the D.C. Circuit in a case holding unconstitutional as violative of the Appointments Clause and separation of powers principles provisions of the Ethics in Government Act providing for judicial participation in appointment and removal of independent counsels to investigate allegations of wrongdoing by members of the executive branch. *In re: Sealed Case,* No. 87-5261 (D.C.Cir. Jan. 22, 1988). That court espoused a "unitary executive" theory which, if applied uncritically, could support the view that the President must be able to supervise executive branch officials in communication of recommendations to Congress. However, the rationale for the theory seems to be that "(t)he Framers provided for a unitary executive to ensure that the branch wielding the power to enforce the law would be accountable to the people." (Slip op. at 27; see also Id., at 64: theory calls for "unitary and uniform execution of the laws"). Since recommending legislation to Congress is not enforcing the law, it does not appear that the "unitary executive" theory is broad enough to encompass Presidential control over the proposed Commission. By contrast, the independent counsel case involved control over criminal prosecutions—what the court described as "one of the President's core executive functions" central to his duty to take care that the laws be faithfully executed (slip op. at 59).

The Department's related argument—that the President's ability to make recommendations for legislation conferred by Art. II, § 3 (the President "shall from time to time give to the Congress information on the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient") is impaired by the restriction—may be disputed on similar grounds. The President's ability to recommend, oppose, or comment on legislation on the subject, directly or through OPM, would be unaffected by S. 522. What is affected is the President's ability to control the findings and recommendations of the Commission. Again, strong argument can be made that Commission members are not executive branch officers because the Commission performs no executive branch functions. Hence, even if the Department's reading of Art. II, § 3 as conferring on the President power to control all executive-branch-originated recommendations for legislation is accepted, the recommendations of the Commission would not fall within that category. Moreover, as noted above, there is precedent in existing legislation for requiring executive branch agencies to

communicate findings or recommendations directly to Congress without review.

Thus, there seems little basis for asserting that the bill would impede the President's exercise of executive authority to such an extent as to offend separation of powers principles of constitutional dimension.

Finally, it may be noted that there is ample precedent for legislation establishing a national study commission charged with preparing a report for submission to Congress and/or the President, and composed of members chosen by or from both the executive and legislative branches. Among the numerous such commissions are the following: Federal Council on the Aging, Pub. L. 98-459, § 204, 98 Stat. 1769 (1984); Commission on the Bicentennial of the Constitution, Pub. L. 98-101, 97 Stat. 719 (1983); Commission on National Development in Postsecondary Education; Pub. L. 96-374, §§ 102, 103, 94 Stat. 1374-76 (1980); Commission on Wartime Relocation and Internment of Civilians, Pub. L. 96-317, 94 Stat. 964 (1980), amended by Pub. L. 97-3, 95 Stat. 5 (1981); National Commission on Air Quality, Pub. L. 95-95, § 323, 91 Stat. 785 (1977); and the Commission on Federal Paperwork, Pub. L. 93-556, 88 Stat. 1789 (1974).

GEORGE COSTELLO,
*Legislative Attorney.*

The Committee took into consideration the Justice Department's objections to the requirement in S. 552 that the Director of OPM present Congress with a plan for implementation of the Commission's recommendations or the Director's reasons for not doing so. The subcommittee substitute, therefore, modified the section to require the Director of OPM to submit a report to the relevant committees of Congress and the Commission which shall include a detailed response to the findings and recommendations of the Commission.

## V. SECTION-BY-SECTION ANALYSIS

Section 1 designates the Act as the "Federal Employee Compensation Equity Study Commission Act of 1987".

Section 2 defines the key terms employed in the Act.

Section 3 provides for the establishment of a Commission on Compensation Equity.

Section 4(a) requires the Commission to hire a consultant to perform a study to determine whether distinctions between rates of basic pay for Federal jobs in executive agencies of the United States Government reflects substantial differences in the duties, difficulty, responsibility, and qualification requirements of the work performed in accordance with section 5101 and 5341 of title 5, United States Code, and are not based on considerations of sex, race, or national origin. The consultant will be required to study the classification, grading, and pay-setting processes within and between the position-classification system under chapter 51 of title 5 and the job-grading system under subchapter IV of chapter 53 of title 5. The consultant shall use standard objective job-evaluation and economic analysis techniques to determine whether the development or implementation of the referenced processes results in the payment of rates of basic pay for positions in which either sex

is numerically predominant or any race or ethnic group is disproportionately represented that are not in proportion to the duties, difficulty, responsibility and qualification requirements of the work performed. the consultant shall prepare and submit a report containing the findings of the study, including a list of any positions identified by the study and the extent of the differences in the rates of pay in such case.

Section 4(b) provides that, for the purposes of Section 4, the term "executive agency" shall have the meaning contained in section 105 of title 5, United States Code.

Section 5(a) requires that, not later than eighteen months after the effective date of the Act, the Commission shall submit a report to the Senate Committee on Governmental Affairs and the House Committee on Post Office and Civil Service. The report shall also be given to the Director of the Office of Personnel Management (OPM).

Section 5(b) mandates that the report shall include the Commission's findings resulting from the study and the Commission's recommendations for administrative or legislative actions, or both, as the Commission considers appropriate, including recommendations regarding section 8 of this Act. These recommendations must be consistent with the proviso of section 6(d)(1) of the Fair Labor Standard Act of 1938 (as added by section 3 of the Equal Pay Act of 1963).

Section 5(c) stipulates that, not later than ninety days after the Commission submits its report to the Committees of Congress, the Director of OPM shall provide to the Committees and the Commission a detailed response to each of the findings and recommendations of the Commission.

Section 5(d) states that, not later than sixty days after the Director submits the Director's report, the Commission shall submit to the Committee of Congress any additional comments deemed appropriate in response to the Director's report.

Section 5(e) specifies that the consultant's study and any findings, conclusions, recommendations, or comments by the consultant or the Commission under this Act with respect to the study shall be considered to be of an advisory nature only.

Section 6(a) provides for the appointment of the nine Commission members, to be appointed in the following manner: two by the President of the United States, one by the majority leader of the Senate, one by the minority leader of the Senate, one by the Speaker of the House of Representatives, one by the minority leader of the House of Representatives, and three by the Director of OPM to represent the three respective Federal employee labor organizations representing, as exclusive representatives, the largest number of individuals occupying positions subject to chapter 51 or subchapter IV of chapter 53 of title 5, United States Code. The members of the Commission may not be a member of Congress and shall, to the maximum extent possible, be chosen from persons who have extensive knowledge and technical expertise in the major areas of the Commission's consideration and study.

Section 6(b) states that all appointments to the Commission must be made not later than sixty days after the effective date of this Act.

Section 7(a) requires the President to designate a Chairman of the Commission from among the Commission members. The Commission shall elect a Vice-Chairman from among its members, who will act as Chairman in the event of the absence or incapacity of the Chairman. Section 7(a) further states that the Commission shall adopt such rules and regulations as it deems necessary to establish and govern its procedures, operations, organization and personnel. Five members of the Commission shall constitute a quorum. Any vacancy on the Commission shall not affect its powers except to satisfy the quorum requirements. Any vacancy shall be filled in the manner in which the original appointment was made.

Section 7(b) provides that each member of the Commission who is not an officer or employee of the United States Government shall receive compensation at a rate equal to the daily equivalent of the rate of basic pay in effect for level IV of the Executive Schedule for each day the member is in performance of the duties of the Commission.

Section 7(c) gives the Commission the authority to appoint, terminate and fix the compensation of such personnel as it considers necessary to assist in the performance of its duties, without regard to the civil service laws, the provision of title 5, United States Code, or any other law relating to the number, classification or compensation of employees. The Commission may use temporary and intermittent services. The Chairman of the Commission, with the approval of a majority of the Commission members, shall appoint an executive director of the Commission. The compensation of employees of the Commission is limited to the rate of pay payable for grade GS–18 under section 5332 of title 5, United States Code. Any service of a person as a member or employee of the Commission will not be considered service in an appointive or elective position in the United States Government for the purposes of sections 8344 and 8468 of title 5, United States Code.

Section 7(d) provides that all members and employees of the Commission and any individuals who perform temporary or intermittent services for the Commission shall, while in performance of the duties of the Commission, be paid per diem, travel and transportation expenses in the manner provided for under subchapter I of chapter 57 of title 5, United States Code.

Section 7(e) grants authority, for the purposes of carrying out this Act, to the Commission or any member authorized by the Commission to hold hearings, take testimony, have printing and binding done, enter into such contracts and other arrangements, and take such actions as the Commission considers advisable to the extent that funds provided by this Act are available. Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission or before any member. The Commission is given the authority to obtain directly from any officer, department, agency, establishment, or instrumentality of the United States Government such information, suggestions, estimates, and statistics as the Commission considers necessary. Each such office, department, agency, establishment, or instrumentality shall furnish, to the extent permitted by law, the information directly to the Commission upon request made on behalf of the Commission. The section further provides that the Commission may use

the United States mails and receive administrative support from the Administrator of General Services in the same manner and under the same conditions as departments and agencies of the United States Government. In addition, the Commission shall not be required by any office or agency of the United States Government to submit any report, recommendation, or other matter to any office or agency for approval, comment, or review before its submission to Congress, Committees of Congress or to the President.

Section 7(f) stipulates that, upon request of the Commission, the head of any Federal agency may detail, on a reimbursable basis, any of the personnel of the agency to the Commission to assist in the performance of its duties.

Section 7(g) states that the Commission shall meet from time to time, as its members deem appropriate.

Section 8 provides for the termination of the Commission ninety days after the date the Commission submits its report subject to section 5(d).

Section 9(a) requires the Commission to develop specifications for the study in the form of a request for proposals and to solicit from the Comptroller General of the United States, the Congressional Office of Technological Assessment (OTA), and the National Academy of Sciences a list of consultants who are appropriate to conduct the study, based on the specifications devleoped by the Commission and the objectivity, extensive knowledge and technical expertise of the consultants in the areas to be studied.

Section 9(b) requires the Comptroller General and OTA to submit the lists to the Commission within sixty days of the Commission's request.

Section 9(c) requires the Commission to select a consultant from among the consultants on the lists provided by the Comptroller General, OTA and the National Academy of Sciences.

Section 10 states that nothing in this Act may be construed to limit or expand any of the rights or remedies provided under the Civil Rights Act of 1964, section 6(d) of the Fair Labor Standards Act of 1938, or any other provision of law relating to discrimination on the basis of race, color, religion, sex, national origin, handicap, or age.

Section 11(a) provides an amount, not to exceed $3,000,000, from the sums appropriated to OPM for general operating expenses for fiscal years 1988 and 1989 to be available to pay the expenses of the Commission. The money shall remain available for use by the Commission until September 30, 1990.

Section 11(b) stipulates that the Commission, by majority vote, shall determine the necessary expenses of the Commission and notify the Director of OPM of their financial needs.

Section 12 states that the effective date of S. 552 shall be October 1, 1987.

## VI. Regulatory Impact of Legislation

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate "the

regulatory impact which would be incurred in carrying out the bill."

This enactment of this legislation would greatly increase the information available regarding the manner in which current title 5 job classification guidelines are being implemented. The Commission's findings and recommendations will be extremely helpful to the relevant Committees of Congress who have been, and will continue, to examine ways in which to improve the civil service system.

## VII. Changes in Existing Law

Rule XXVI of the Standing Rules of the Senate requires that changes in existing law made by the bill, as reported, be detailed in the Committee Report accompanying the bill. S. 552 will require no changes in current law.

## VIII. Cost Estimate of Legislation

Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office (CBO) has reviewed the cost implications of S. 552. The following is CBO's estimate of the potential costs of this legislation:

U.S. Congress,
Congressional Budget Office,
*Washington, DC, February 11, 1988.*

Hon. John Glenn,
*Chairman, Committee on Governmental Affairs, U.S. Senate, Dirksen Senate Office Building, Washington, DC.*

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 552, the Federal Employee Compensation Equity Study Commission Act of 1987, as ordered reported by the Senate Committee on Governmental Affairs, November 18, 1987. CBO estimates that the commission would cost $3 million over the 1988–1990 period, assuming appropriation of the authorized sums.

The bill would establish the Commission on Compensation Equity to study and report on the pay classification system for federal employees. Because the effective date of the bill is specified as October 1, 1987, the report would be due on April 1, 1989, and the commission would expire on July 1, 1989. The bill authorizes the commission to use up to $3 million of the sums appropriated to the Office of Personnel Management for fiscal years 1988 and 1989.

Enactment of this bill would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

James L. Blum,
*Acting Director.*

## IX. MINORITY VIEWS OF MESSRS. TRIBLE, ROTH, AND RUDMAN

Our opposition to S. 552 is based on three points. First, the comparable worth study mandated by this proposal is based upon a flawed methodology that will not achieve the goals it seeks to realize. Second, the proposed study is likely to result in litigation and administrative policies that, in a time of disturbing budget deficits, will result in sizable new levels of Federal debt. Third, the long-term impact of the proposed study, and the implicit acceptance of the comparable worth methodology that underpins it, will have a negative impact on the very people it purports to aid as well as on the nation as a whole.

We preface our explanation of these three points by stating clearly and unequivocally that we oppose wage-based discrimination in the workplace in any form. We support vigorous enforcement of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. We embrace the concept of equal pay for equal work without regard to sex, race, age or other personal characteristics. We believe that every person in the workplace should have equal opportunity to move into management positions and non-traditional job categories.

### COMPARABLE WORTH IS A FLAWED METHODOLOGY

We are troubled, however, by the concept of comparable worth. Equal pay for equal work is a straightforward principle, enforceable by law. Comparable worth, however, embraces the concept that different jobs should pay equal salaries if their value to an organization or society is somehow judged comparable. Thus comparable worth goes well beyond the current legal requirement of "equal pay for equal work."

Our opposition to this proposal is not over whether or not discrimination continues to exist, it is over whether comparable worth is, in fact, a solution. It is with the basic premise upon which comparable worth is based that we disagree. Comparable worth calls for the comparison of differing job categories for which point values are awarded according to the nature and difficulty of the work. Thus a comparable worth scheme might eventually determine the relative level of compensation for a firefighters and librarians, or truck drivers and secretaries, based on the point values assigned to the position types.

But in comparing a nurse to an accountant or a mine safety worker to a secretary, we wonder, how can one objectively determine the relative value of these positions? Which requires more training or experience? Which requires a talent that is rare or difficult to develop? Which requires more effort, either physical or intellectual? Which possesses a more or less desirable environment in

which to work? These are highly subjective determinations that cannot be determined by bureaucratic analysis.

More specifically, comparable worth is an economic theory holding that jobs have intrinsic, measurable value. The theory then dictates that salaries be based solely on those determined values rather than on market consideration. We disagree with this notion. All jobs do not have fixed, intrinsic values, and all jobs cannot be compared and ranked by the same criteria in a single job rating system.

Worth in itself is an illusive concept, subject to changes based on competition, consumer preferences, individual merit or experience, new technology or other market forces. Two jobs may have comparable characteristics, but they do not necessarily have comparable values. Our rewards are determined not by an artificial value structure but by the market's measure of our economic contribution.

The free market works by processing information on the scarcity of talents, the preferences of individuals, the demands of consumers, and the availability and cost of other resources and technologies. Market wages must reflect a balance between what employers are willing to pay for workers' services and how much is needed to induce workers to supply the labor for particular jobs. The methodology called for by this legislation seeks to set up artificial comparisons of different jobs while ignoring legitimate market factors, such as supply and demand, which have an impact on wages.

By attempting to compare dissimilar jobs simply on the basis of the "totality" of points, the methodology contained in S. 552 seeks to mask fundamental differences in the elements that constitute various jobs. For example, if two jobs each were to receive 1,500 points from the independent consultant selected to carry out the study, comparable worth will treat those jobs as being similar—and deserving of similar pay—even though the jobs might differ significantly in each of the components being measured, such as skills, effort, responsibility, qualifications, and working conditions.

One job might be ranked high because it is demanding in terms of "effort" and "working conditions." Another job might receive the same point total primarily because of the "qualifications" and "responsibility" it demands. Two jobs with such different components might well command different pay rates in the labor market because of different supply and demand factors. Yet, the proposed study will decide whether the two jobs were paid "appropriately" strictly on the basis of their equivalence in total points.

Thus, there is not such thing, as the proposal would suggest, as standard objective job evaluation techniques. Three evaluators analyzing the same job undoubtedly will produce three different results. There is no singular objective job measurement system.

Moreover, the bill requires the use of "economic analysis" to assist in determining whether the difference in pay between two allegedly comparable jobs is due to discrimination. But it is widely acknowledged that no such economic analysis is capable of ascertaining all of the nondiscriminatory reasons for a pay gap between two different jobs. There are always nondiscriminatory factors affecting pay-setting that no economic analysis can measure. Each

such analysis, therefore, always shows a residual part of the pay gap, the cause of which no one, including comparable worth proponents, can explain.

In sum, the bill's methodology calls for the use of "objective" job evaluation techniques which do not exist, followed by an "economic analysis" which cannot explain all of the nondiscriminatory reasons for differences in pay between two jobs. These two studies, separately or together, are incapable of determining whether pay discrimination exists—yet this is the principal purpose of the bill.

The structure of the bill is flawed further by the composition of the nine member Commission called for in section 6(a) of the proposal. The bill mandates that three of the nine members of the Commission represent the three largest Federal employee unions, yet no management representatives are required to serve on the Commission. Thus the perspective of the Commission members is likely to be biased from the outset. This concern is heightened by the degree of control the Commission is granted over the conduct of the study. For example, the Commission is granted the authority to hire the consultant who will carry out the comparable worth study. The expansive role of the Commission and its unbalanced representation are a major concern.

COMPARABLE WORTH WILL GENERATE INSUPPORTABLE COSTS

Our second reason for opposing this legislation is the cost to the Federal Government that will result from the litigation and the government pay policies that inevitably will flow from the conduct of the study. The concern over a litigation nightmare for the Federal Government is exemplified by the experience that the State of Washington had with its comparable worth study.

When the state failed to implement the recommendations produced by its comparable worth study, it was taken to court. Some reputable observers believe that the district court decision, if implemented, would have resulted in back pay and pay raise costs of from $800 million to $1 billion. The district court decision was overturned on appeal by the Ninth Circuit Court of Appeals. That opinion soundly and thoroughly rejected the utility of comparable worth theory or studies as a means of determining pay discrimination. As judge, now Justice, Kennedy stated in that opinion, "neither law nor logic deems the free market a suspect enterprise." He found "nothing in the language of title VII or its legislative history to indicate congress intended to abrogate fundamental economic principles such as supply and demand or to prevent employers from competing in the labor market."

It should be kept in mind that the estimated costs of the district court's decision in the Washington State case were only remedying alleged gender discrimination, whereas S. 552 includes race and ethnicity in its mandate as well. Moreover, the Federal Government has many more employees than the State of Washington.

In view of the fact that the courts have so soundly rejected comparable worth theory as a basis for determining the existence of pay discrimination, which is the objective of this bill, why should congress take even a first step down this road? Not only might a plaintiff find a judge who might misuse the comparable worth

study, as did the district court in the Washington State case, but congress will face subsequent legislation calling for expensive pay increases based upon the study.

Thus, with or without litigation, the study and Commission report mandated by the proposal will serve as the basis for expensive demands for Federal pay increases over and above the usual annual increases, thereby significantly adding to the Federal deficit. The proposal is written in order to permit the increase in pay for certain job types but prevents the decrease in pay for any jobs.

Unless some jobs are eliminated, therefore, the study will result in significant additional personnel costs for the Federal Government. The huge cost of imposing a comparable worth scheme cannot be ignored. The cost of artificially closing the male/female wage gap has been estimated to be billions of dollars. The inclusion of other protected groups as required by this proposal will push these estimated costs even higher. If the court ordered settlements for back pay we alluded to are leveled at the Federal Government as well, the deficit figure will mushroom.

COMPARABLE WORTH WILL PRODUCE UNINTENDED CONSEQUENCES

While comparable worth may be an appealing idea to some, its consequences will be wholly undesirable, hurting even the people it is intended to assist. These unintended consequences represent our third reason for opposing the legislation. If implemented, comparable worth will create regulatory and litigation nightmares, disrupt labor markets, cause the loss of jobs, artificially inflate some wages and deflate others, and impose an additional drag on our national effort to create sustained economic growth and improve our competitive position internationally.

Regulatory problems inevitably will result from the implementation of comparable worth. The subjective nature of the job evaluations called for in a comparable worth study can only lead to complex and voluminous regulations to justify the point values decided upon for the various job types. Moreover, the pay adjustments that will be triggered by a comparable worth study will generate yet another spate of regulations.

The last time the Congress addressed Federal personnel issues in a comprehensive fashion, in the Civil Service Reform Act of 1978, it sought through performance measurement and other provisions to inject greater objectivity into the system. Comparable worth contradicts this approach by reverting to a subjective means of job evaluation. In a personnel system already bogged down by excessive, confusing regulations, the overlay of a comparable worth generated set of rules will further diminish effective administration.

Furthermore, comparable worth will wreak havoc with labor markets because it will artificially inflate the value of some types of jobs and, in relative terms, deflate the value of others. This could result in a shortage of candidates for some job types and an overabundance of candidates for others. Over supply of candidates for some jobs and under supply of candidates for other jobs will detract from efficient government operation, further diminishing the effective delivery of public goods and services. In light of our existing problems in effectively managing the sprawling Federal bu-

reaucracy, any step that will further complicate these administrative responsibilities should be avoided.

Moreover, because we have a limited pool of funds in government, the increase in pay for a certain job category may well result in the diminution in the total number of jobs in that category. Fewer jobs would result in the loss of employment for some of those that the proponents of this measure seek to help. This measure could alternatively disrupt labor markets because, although it is not targeted at the private sector, it inevitably will have spill over effects on the value placed on jobs outside of governemnt. Artificially increased wages for certain governmental jobs will influence the career decisions of individuals in the private sector as well as of those in government.

Interjecting this non-market factor into the decision process for private sector employees could well result in a shortage of candidates for some job types. To correct this, private sector employers will be forced to raise the value for such job types in order to attract and retain the needed employees. Thus the original comparable worth study could have very real effects on the private sector labor markets, even though the private sector is not specifically covered by the bill.

Furthermore, despite the language restricting the study to title 5 of the United States Code, enactment of this proposal may set a precedent for expanding title VII of the Civil Rights Act to incorporate the comparable worth standard for evaluating discrimination. After all, the purpose of S. 552 is to determine whether there is discrimination in Federal pay. Since title VII applies to the private sector as well as to the Federal Government, private sector employers may be faced with litigation and be pressured to adopt job evaluation studies similar that described in this report, should the proposal be enacted.

As the committee considers this comparable worth report, the Senate is engaged in a debate over trade legislation ostensibly designed to improve our competitive position in the international economy. Comparable worth, by placing yet another mandate upon government, works at cross-purposes to these competitiveness goals. The potential impact of comparable worth on the private sector will only serve to further inhibit our ability to restore our competitive edge internationally and to foster sustained economic growth for all of our people.

## CONCLUSION

If, as we believe, the comparable worth study described in this report should be rejected, what then are the remedies for wage discrimination in the workplace? Exisiting laws provide powerful tools for eradicating wage discrimination where it is found to exist. Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, provide that individuals cannot be denied equal pay for equal work or intentionally be paid differently than others because of their sex, race or national origin.

If an employer, be it the Federal Government or someone in the private sector, has violated these prohibitions back pay and wage

adjustments can and should be ordered. Our laws prohibiting discrimination should be vigorously enforced.

We have heard the argument made that one can hardly vote against a mere study. What harm is there in studying an issue? We caution our colleagues that this is not a mere study. It is a proposal that incorporates a radical new method for determining the value of jobs and assessing the existence of discrimination. If the Senate approves the comparable worth proposal described in this report, it will help to legitimize a theory that will subvert the market, will decrease the efficient operation of the economy thereby decreasing productivity and will result in the elimination of jobs. Members should not be allured by the simplistic theory of comparable worth; it is a theory that will not work.

The goal of equal employment should be to create complete job mobility of all classes of employees, giving access to all job types. Realization of this goal requires sustained and aggressive enforcement of existing equal rights protections. Comparable worth will not contribute to the realization of this goal. For this reason and for all of the reasons we have cited, the proposed comparable worth legislation, S. 552, should not be enacted.

PAUL S. TRIBLE, Jr.
WILLIAM V. ROTH, Jr.
WARREN RUDMAN.

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